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APPENDIX

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-26

No. ~~867~~

MILLARD GOODING, Warden,
Appellant,

—v.—

JOHNNY C. WILSON,
Appellee.

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appeal Filed October 17, 1970
Probable Jurisdiction noted June 21, 1971

WILSON - LINES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

DOCKET ENTRIES

1969	Date—Proceedings.
Mar.	5—Pet. for writ of habeas corpus, with pauper's affidavit, and order allowing pet. filed in forma pauperis & directing petitioner & respondent to file brfs. with the ct. on the constitutional ques- of the validity of Ga. Code Sec. 26-6303 within 10 days, filed. Copy to counsel. Copy to Warden. Copy of pet. to Warden & Att'y Gen. Bolton.
Mar.	13—Request of Att'y (Franklin H. Pierce, for Richmond Co.), for exten. of time to file br. filed. Order extending time for filing brfs. until April 1, 1969, filed. Copy to counsel.
	Notice, and motion for leave to file brief amicus curiae by Arthur K. Bolton, Atty. Gen., St. of Ga., in support of respondent—filed. To SOS with file.
Mar.	24—Order filed that Atty. Gen. Arthur K. Bolton is granted leave to file amicus curiae brief in support of respondent & time for filing same extended until 4-1-69. Copies to counsel.
April	1—Brief amicus curiae of the Attorney General of Georgia, filed.
April	2—SUBMITTED ON PETITION FOR WRIT OF HABEAS CORPUS.
April	1—Petitioner's brief on the validity of Georgia Code § 26-6303, filed. To SOS. Brief of respondent filed.
July	8—Order filed ruling Court must conclude that Ga. Code 26-6303 is unconstitutionally vague and broad, and the conviction therefor is set aside; that portion of deft's. confinement attributable to a conviction under this statute must necessarily fall, and SO ORDERING.

1969	Date—Proceedings.

JUDGMENT filed and entered by Clerk in favor of petitioner and against respondent. (Copy of order & judgment to counsel) .

July 11—Respondent's *notice of appeal to the U.S.C.A.*, filed. Copy to petitioner's counsel & copy to U.S.C.A. with copy of docket sheet.

July 17—Respondent's notice of appeal to the Supreme Court of the U. S., filed. Copy to U.S.C.A., U.S.S.C., & petitioner's counsel.

Petitioner's motion for release on his recognizance or for bail pending appeal, filed. Brief in support, filed.

July 24—Order that respondent forthwith produce petitioner, Johnny C. Wilson, at office of U.S. Marshal, U.S. Courthouse Bldg., Augusta, Ga., & release petitioner from further confinement upon petitioner giving reasonable bail in amt. of $1,000.00 on his own recognizance, or posting bond with surety in said amt., said bail shall be conditioned upon petitioner personally appearing to abide the final order, judgment or sentence upon him, this his bond to be void, else of force; that respondent may appear before Judge Smith on August 11, 1969, at the U.S. Courtroom 232, Atlanta, Ga., & show cause, if any he has, why petitioner should not be continued at liberty on bail provided herein & that copy of order be served forthwith upon respondent, filed. Certified copies of order to U.S. Marshal, Augusta, Ga., & U.S. Marshal, Atlanta, Ga. Certified copy to respondent. Copy to counsel. Certified copy to Att'y Gen. Bolton.

ATTEST: A TRUE COPY.
CERTIFIED THIS
29th DAY OF JULY, 1969.
CLAUDE L. GOZA
Clerk

By: /s/ HELEN D. SMITH
Deputy Clerk

5. Georgia Code Annotated § 26-6303, under which petitioner was convicted on counts 3 and 4 of the indictment is on its face unconstitutionally vague and overbroad in violation of the first amendment and due process clause of the fourteenth amendment, it failing to apprise persons with sufficient particularity of the conduct which is sought to be prohibited and, by its excessive breadth, prohibiting activity protected by the first amendment. A copy of the statute is attached as Exhibit 3.

6. Georgia Code Annotated § 26-6303 is unconstitutionally vague and overbroad in violation of the first amendment and due process and equal protection clauses of the fourteenth amendment as applied to petitioner in the following respects:

(a) Neither the case law of the State of Georgia, the trial court, nor the Supreme Court of Georgia defined the words "opprobrious words or abusive language," thereby leaving the determination of petitioner's guilt to the discretion of the jury without adequate safeguards of petitioner's due process right of notice or first amendment right of freedom of speech.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Number 12511

[Filed March 5, 1969]

JOHNNY C. WILSON,
Petitioner,

MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp,
Respondent.

ORDER

The habeas corpus petition in the within case presents serious and important jurisdictional questions under the provisions of 28 U.S.C.A. § 2254. The court has concluded that the petition shows on its face that available state remedies have not been exhausted as to the contentions raised in paragraph 6(b), paragraph 7, paragraph 8, and paragraph 9. Accordingly, the petition is dismissed as to said grounds. *Peters* v. *Rutledge*, 397 F.2d 731 (5th Cir. 1968); *Henderson* v. *Dutton*, 397 F.2d 375 (5th Cir. 1968); *Rearden* v. *Smith*, —— F.2d —— (5th Cir. 26183, 1968); *Fox* v. *Dutton*, —— F.2d —— (5th Cir. 26060, 1968).

However, the court has concluded that the prisoner has exhausted his remedies as to the contentions raised in paragraph 5 and paragraph 6(a), attacking the conviction in the alleged unconstitutionality of Georgia Code § 26-6303. The ruling by the Georgia Supreme Court in 223 Ga. 531 (July 14, 1967) obviates the need to raise and appeal the identical question by state habeas corpus. *Duke* v. *Wingo*, 386 F.2d 304 (6th Cir. 1967); *Staino* v. *Brierly*, 387 F.2d 597 (3rd Cir. 1967); *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967); *Cox* v. *Russell*, 283 F. Supp. 171 F. Supp. 171 (D.C. Pa. 1968).

Moreover, while direct appeal was available on this question under 28 U.S.C.A. § 1257 to the United States Supreme Court and petitioner erroneously sought to proceed by certiorari, apparently this is no bar to a direct proceeding in District Court indirectly testing the same constitutional question previously ruled upon by the state Supreme Court. *Fay* v. *Noia*, 372 U.S. 391 (1963); *Hunt* v. *Page*, 355 F.2d 169 (10th Cir. 1966); *Application of Boyd*, 189 F. Supp. 113 (1959). While this result produces obvious strain on the relationship of the federal and state systems, the court concludes that it must, if desired by petitioner, proceed on this single question.

Accordingly, such petition is ordered filed in forma pauperis and this being a pure question of law and no hearing being necessary, the petitioner and respondent are hereby directed to file briefs with the court on the constitutional question of the validity of Georgia Code § 26-6303 within ten (10) days.

IT IS SO ORDERED.

This the 4th day of March, 1969.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Number 12511

[Filed July 8, 1969]

JOHNNY C. WILSON

vs.

MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp

ORDER

In this writ of habeas corpus petitioner seeks to set aside his conviction on a number of grounds. The Court, in an order dated March 4, 1969, concluded that petitioner had not exhausted his available state remedies as to contentions raised in paragraphs 6b, 7, 8, and 9 of the writ. The Court concluded that petitioner had exhausted his remedies as to the contention raised in paragraphs 5 and 6(a), attacking his conviction on the grounds of the alleged unconstitutionality of Georgia Code § 26-6303. The Court also concluded that petitioner's failure to utilize a direct appeal to the United States Supreme Court under 28 U.S.C. § 1257 did not constitute a bar to this proceeding. Accordingly, this order will not deal with the alleged unconstitutional application of this statute nor any of the other points raised in the writ, except for the facial unconstitutionality of Georgia Code § 26-6303.

Georgia Code § 26-6303 provides in relevant part:

> Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.

The question of constitutionality of this statute is exceedingly complex and difficult. None of the reported cases that have come to this Court's attention have dealt with the precise issues presented herein, yet many cases have dealt with at least some aspects of the instant statute. First Amendment rights have assumed a protected place in our jurisprudence. Great care must be taken in this area to assure that vague or overbroad laws do not infringe upon these rights. See, *e.g.*, Ashton v. Kentucky, 384 U. S. 195 (1966); Dombrowski v. Pfister, 380 U. S. 479 (1965). Since speech is normally intended to change the opinions or reinforce the opinions of others, problems arise as to the extent to which mere speech may be curbed when it provokes others into action. The cases reflect the view that peaceful expression of even unpopular views is permitted and even encouraged.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . .

Terminiello v. Chicago, 337 U. S. 1, 4-5 (1948). In a recent decision the Supreme Court has taken a further step in elaborating upon the above language.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing lawless action and is likely to incite or produce such action. As was said in

> Noto v. United States, 367 U. S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. See also Herndon v. Lowry, 301 U. S. 242, 259-261 (1937); Bond v. Floyd, 385 U. S. 116, 134 (1966).

This decision in Brandenburg v. State of Ohio, 37 U.S.L.W. 4525 (June 9, 1969) logically followed from the Court's earlier decisions in Yates v. United States, 354 U. S. 298 (1957); DeJonge v. Oregon, 299 U. S. 353 (1937); Stromberg v. California, 283 U. S. 359 (1931). But a speaker passes the bounds of argument and persuasion and undertakes incitement to riot. See, *e.g.*, Feiner v. New York, 340 U. S. 315 at 321 (1950). The above distinction, while easily stated, is not so easily applied to a given factual situation. What is clear, however, is the fact that the Supreme Court will not allow intrusions into this protected area.

> For standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U. S. 415 at 432-33 (1963). Thus, in *Ashton* v. *Kentucky*, *supra*, the Court struck down a statute prohibiting ". . . any writing calculated to create disturbances of the peace. . . ." In Terminiello v. Chicago, 337 U. S. 1 (1949), the Court struck down an ordinance forbidding any "breach of the peace" where the trial judge instructed the jury that any misbehavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" violated the ordinance. Clearly, a statute may not involve "calculations as to the boiling point of a particular person or a particular group," but must involve "an appraisal of the nature of the comments *per se*." *Ashton*

v. *Kentucky*, *supra* at 200. Numerous other decisions have overturned breach of the peace statutes and related statute where the offense was improperly or imprecisely defined. See, *e.g.*, Edwards v. South Carolina, 372 U. S. 229 (1963); Cox v. Louisiana, 379 U. S. 536 (1965); Hunter v. Allen, 286 F. Supp. 830 (N.D.Ga. 1968); University Committee to End The War In Viet Nam v. Gunn, 289 F. Supp. 469 (W.D. Tex. 1968); Baker v. Bindner, 274 F. Supp. 658 (W.D.Ky. 1967); Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967); Carmichael v. Allen, 267 F. Supp. (N.D.Ga. 1967).[1]

Having generalized as to the legal background in this area, the Court is now faced with a decision as to the constitutionality of Georgia Code § 26-6303. Defendant argues that the phrases "opprobrious words" and "abusive language" have a well defined meaning in the Georgia law and are not so broad as to impinge upon protected areas. In construing this code section the Courts have held that the words of the enactment are to be taken in their ordinary signification. Stevenson v. State, 90 Ga. 456 (1892). The Georgia Courts have definitely established grimaces or facial expressions of contempt do not constitute "opprobrious words or abusive language."

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[1] In *Carmichael*, *supra*, the Court noted:

> . . . [I]t takes no elaboration to demonstrate that the term "vulgar" in connection with "language", and the use of the term "tending to disturb the good order, morals, . . . or dignity of the City" leaves "the executive and judicial branches too wide a discretion in the application" of the law. It too readily permits them to make a crime out of what is protected activity.

Id. at 998-99.

In *Hunter* v. *Allen*, *supra*, while commenting upon Atlanta's disorderly conduct statute, the Court observed:

> In short, the standards are overwhelmingly subjective. What is an "angry threat"? What is "abusive" conduct? What is "roughly crowding"? What is a "dangerous manner"? The reaction of some unknown third party could determine the guilt or innocence of the accused.

Id. at 836.

Behling v. State, 110 Ga. 754 (1900). In Fisk v. State, 124 Ga. 416 (1905), the Court reversed a trial judge's instructions that as a matter of law certain words were opprobrious and abusive, stating that this as well as whether it was calculated to cause a breach of the peace were questions for the jury. This holding appears to be contrary to the holding of the Georgia court in the instant case that the words used by the petitioner were opprobrious and abusive per se. Again in Jackson v. State, 14 Ga. App. 19 (1913), the court stated that this was a question for the jury, but again failed to define these terms. The decision in Dillard v. State, 41 Ga. 278 (1870) deals only with the provision as to the use of obscene or vulgar language in the presence of a female. Thus, in the decisions brought to this Court's attention, no meaningful attempt has been made to limit or properly define these terms. Some courts have approved reference to a standard dictionary to define statutory terms. *E.g.*, United States v. String, 263 F. 789, 796 (W.D. Wash.). According to Webster's New International Dictionary (2d Ed. 1941), opprobrious means: "Expressive of opprobrium; attaching disgrace; reproachful; scurrilous . . ." Synonyms include "disgraceful, abusive, insulting, offensive." The same work lists as synonyms for insulting, the terms "insolent and offensive." Thus, in the dictionary sense of these phrases, they both include the words that are offensive, thus arguably encroaching upon the mandates of *Brandenburg, supra, Ashton, supra,* and *Terminiello, supra.* There is dicta in Cantwell v. Connecticut, 310 U. S. 296 (1940) that certain epithets, profane and indecent in nature, would not be protected. The case of Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) suggests that "fighting words" may result in punishment.[2] Moreover, this Court does not see any

[2] However, the higher courts have thus far failed to provide a precise standard themselves. Such expression is needed if the lower courts are to be continually called upon to inquire into the validity

policy reasons for upholding the right of a person to use the type of language expressed by this petitioner. It strains the concept of freedom of speech out of proportion when it is argued that such language is and should be protected. However, this consideration is really not relevant to the present inquiry, except to suggest that a narrowly and precisely defined statute could have reached this sort of speech. The fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application. The State argues that the statute is saved by the adding requirement of "tending to breach the peace." This is a persuasive argument until one reads the decision in *Ashton* v. *Kentucky*, *supra*, wherein the Court states in reference to *Edwards* v. *South Carolina*, *supra* and *Cox* v. *Louisiana*, *supra*:

> These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility.

Id. at 200. Moreover in *Cox* v. *Louisiana*, *supra*, at 551, the Court struck down as unconstitutionally vague and broad a statute including as an element the congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned." As construed by the Georgia courts, especially in the instant case, the Georgia provision as to breach of the peace is even broader than the Louisiana statute.

Thus, the Court must conclude that Georgia Code 26-6303 is unconstitutionally vague and broad, and the conviction therefor is set aside.

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of similar state statutes and local ordinances. Cantwell v. Connecticut, 310 U. S. 296 (1940) gives the most likely basis, insofar as it is still valid.

That portion of defendant's confinement attributable to a conviction under this statute must necessarily fall.

IT IS SO ORDERED.

This the 7th day of July, 1969.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 12511

JOHNNY C. WILSON

vs.

MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp

JUDGMENT

The Court, Honorable Sidney O. Smith, Jr., United States District Judge, by order of this date having granted the petition for writ of habeas corpus, ruling Georgia Code 26-6303 is unconstitutionally vague and broad, and the conviction therefor is set aside, and that portion of defendant's confinement attributable to a conviction under this statute must necessarily fall,

JUDGMENT is hereby entered in favor of the petitioner and against respondent.

Dated at Atlanta, Georgia, this July 8, 1969.

CLAUDE L. GOZA
Clerk

By: /s/ RUTH M. STILLWELL
Deputy Clerk

Filed and entered in
Clerk's Office
this July 8, 1969
CLAUDE L. GOZA
Clerk

By: /s/ RUTH M. STILLWELL
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 28274

JOHNNY C. WILSON,
Petitioner-Appellee,

versus

MILLARD GOODING, Warden, Richmond County Public Works Camp, Richmond County, Georgia,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(August 19, 1970)

Before SIMPSON, MORGAN, and INGRAHAM, Circuit Judges

INGRAHAM, Circuit Judge: Petitioner-Appellee Wilson was indicted and convicted in Superior Court of Fulton County, Georgia, on two counts of assault and battery, and two counts of using opprobrious and abusive language,[1] the latter in violation of Georgia Code § 26-6303.[2]

[1] On Counts 1 and 2, appellee received consecutive 12 month sentences for committing assault and battery on each of two police officers. He received an additional sentence of 12 months on counts 3 and 4 for using opprobrious and abusive language to each officer. The sentence on count 4 was to run concurrently with that of count 3, and thus appellees total prison term for the state prosecution was to be 36 months.

[2] § 26-6303 of the Code of Georgia (1933) provides that:

"Any person who shall, without provocation, use to or of another, and in his presence, or by telephone, opprobrious words

Appellee filed a petition for a writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254. Among other claims, he alleged that § 26-6303 was unconstitutional on its face under the First and Fourteenth Amendments because of its vagueness and overbreadth. The district court, in an order dated March 4, 1969, dismissed all of appellee's habeas corpus claims with the exception of the question involving § 26-6303, it appearing that state remedies had not been exhausted. The question of the facial constitutionality of § 26-6303, however, had previously been before the Georgia Supreme Court,[3] obviating the need to exhaust state remedies on that matter.[4]

In a subsequent order entered on July 8, 1969, the district court held § 26-6303 unconstitutional on its face and ordered the release of appellee from that portion of his confinement attributable to his conviction under the statute. *Wilson* v. *Gooding*, 303 F.Supp. 952 (N.D.Ga. 1969). Appellants, Millard Gooding and the State of Georgia, in seeking reversal of this judgment and order, raise the following two issues:

I. Did the district court err by failing to request a three-judge court pursuant to 28 U.S.C. § 2281 when an application for a writ of habeas corpus raises a substantial question of the constitutionality of a state statute?

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or abusive language, tending to cause a breach of the peace, or who shall, in like manner use obscene and vulgar or profane language in the presence of, or by telephone to, a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character shall be guilty of a misdemeanor."

[3] Wilson v. State, 223 Ga. 531, —— S.E.2d —— (1967).

[4] The district court's order called for briefs to be submitted on the constitutional issue, and at this point the State of Georgia entered the case as amicus curiae.

II. Did the district court err in holding § 26-6303 unconstitutionally vague and overbroad on its face and as interpreted by the Georgia courts?

I.

The first issue involves a possible conflict between habeas corpus and three-judge court jurisdiction under § 2281.[5] It is well recognized that there are four essential requirements for the application of § 2281: "(1) a state statute must be challenged; (2) a state officer or local officer performing a state function must be a party defendant; (3) injunctive relief must be sought; (4) it must be claimed that the statute is contrary to the Constitution." *Gilhool* v. *Chairman & Com'rs, Philadelphia Co. Bd. of Elections*, 306 F.Supp. 1202, 1205 n.2 (E.D. Pa. 1969), *aff'd*, 397 U.S. 147 (1970); C. Wright, Federal Courts § 50, at 189 (2d ed. 1970). See also *Hall* v. *Garson*, —— F.2d ——, —— (5th Cir. 1970, No. 29690, July 22, 1970, at 25). Although there is no problem in the case sub judice with requirements (1), (2) and (4), there was no prayer for injunctive relief. Appellants, however, argue that in substance, if not in form, all four requisites have been met because the effect of holding § 26-6303 unconstitutional was to enjoin a state officer from enforcing a state statute.

In sum, appellants are calling for a liberal construction of § 2281. The Supreme Court, however, has re-

[5] "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C.A. § 2281

peatedly warned that the three-judge court legislation is not "a measure of broad social policy to be construed with great liberality," but rather "an enactment technical in the strict sense of the word and to be applied as such." *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). See *Mitchell* v. *Donovan*, —— U.S. —— (1970) [38 U.S.L.W. 4514, June 15, 1970]; *Hall* v. *Garson*, *supra*. The Court has also taken the position that under the analogous provisions of 28 U.S.C. § 2282, dealing with federal statutes, when plaintiffs merely attack the validity of legislation without also ". . . affirmatively [seeking] to interdict the operation of a statutory scheme," a single district judge alone must hear the case. *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). See *Mitchell* v. *Donovan*, *supra*; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 153-55 (1963).[*]

The specific question raised by appellants is whether a single district court judge has jurisdiction to pass upon the constitutionality of a state statute in a habeas corpus proceeding in view of the requirement for a three-judge court under § 2281. To our knowledge, there has been no discussion of this particular issue beyond the district court level. The majority of lower courts, however, have followed the view that § 2281 has no relation to habeas corpus proceedings and thus that a single judge is sufficient. *United States* v. *York*, 281 F.Supp. 8, 12 (D.C. Conn. 1968); *McCarrol* v. *Faust*, 278 F. Supp. 448, 450 (E.D.La. 1968); *United States* v. *Warden of Wallkill Prison*, 246 F.Supp. 72, 92 n.16 (S.D.N.Y. 1965), *aff'd*, 355 F.2d 208 (2d Cir. 1966); *United States* v. *Commonwealth of Pennsylvania*, 214 F.Supp. 913 (W.D.Pa. 1963); *United States* v. *Warden of Clinton Prison*, 29

[*] In these cases the Court refused to equate suits for a declaratory judgment with suits for injunctive relief. In the case at bar, no injunction was sought or granted barring prosecution of other persons by Georgia authorities under Georgia Code § 26-6303.

F.Supp. 486, 489 (N.D.N.Y. 1939), *aff'd*, 108 F.2d 861 (2d Cir. 1940), *cert. denied*, 309 U.S. 661 (1940).[7]

The question we face is actually a matter of balancing values, for we must make a choice betwen judicial economy and federal-state comity. We recognize that the passage of § 2281 was motivated by "the indignity and injustice which it was felt was being done to the states in having their solemn legislative acts, and the efforts of state officers to enforce them, impeded, perhaps frustrated, by the interlocutory fiat of a single judge. . . ." Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795, 804 (1934). However, a particular state prisoner, such as appellee Wilson, in seeking discharge from prison on the grounds of conviction under an unconstitutional statute, does not threaten to frustrate the operation or existence of state government. Despite the many applications for habeas corpus, it is very seldom that a federal district judge orders the release of a prisoner the state has convicted. C. Wright, *supra*, § 50, at 217. On the other hand, the number of applications is increasing rapidly. To require a three-judge court for every case similar to the instant proceedings would place an unacceptable burden on the federal judiciary.[8]

The convening of a three-judge court is an extraordinary procedure which in itself imposes a burden on

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[7] Appellants assert that most of these cases rely on the *Clinton* case for authority, even though it merely indicates that "a single District Court Judge *seems* to have jurisdiction." 29 F.Supp. at 489 (emphasis added). However, the more recent opinions cited above are very definite in stating that a three-judge court is not necessary when the constitutionality of a state statute is attacked on a petition for federal habeas corpus. This is indicative of the trend that these lower federal courts have followed.

[8] The Judicial Conference of the United States in 1959 endorsed a proposal calling for a three-judge court for habeas corpus applications, but it retreated from this position in 1965 in realization of the troublesome burden that would result. C. Wright, *supra*, § 53, at 218. See Ann. Rep. of the Judicial Conference of the United States, 1965, at 83.

our federal court system. The summoning of another district judge and a circuit court judge may often result in a delay in matters needing immediate attention. *Allen* v. *State Board of Elections*, 393 U.S. 544, 561 (1969); *Swift & Co.* v. *Wickham*, 382 U.S. 111, 128 (1965). The direct appeal provision deprives the Supreme Court of often crucial adjudications by the courts of appeals, and thus the Court has called for utmost caution in any attempts at extention of the procedure. *Allen* v. *State Board of Elections*, *supra*, at 562; *Swift & Co.* v. *Wickham*, *supra*; *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934).

After considerable reflection, it is our opinion that the district court's assumption of habeas corpus jurisdiction in the case sub judice should be upheld. Appellants' proposed liberal construction of § 2281 would turn the three-judge court into a habeas corpus panel. In the interest of judicial economy, a strict construction is necessary and thus there is no § 2281 jurisdiction.

II.

After careful independent examination of the constitutionality of Georgia Code § 26-6303 and its interpretation by the Georgia courts, we find that the opinion-order of the district court, *Wilson* v. *Gooding*, 303 F.Supp. 952 (N.D.Ga. 1969), carefully and fully delineates the reasons for holding § 26-6303 unconstitutionally vague and overbroad. We agree with the well reasoned opinion of the district court and its judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28274

D. C. Docket No. CA 12511

JOHNNY C. WILSON,
Petitioner-Appellee,

versus

MILLARD GOODING, Warden, Richmond County Public Works Camp, Richmond County, Georgia,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before SIMPSON, MORGAN, and INGRAHAM, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that respondent-appellant pay to petitioner-appellee, the costs on appeal to be taxed by the Clerk of this Court.

August 19, 1970

Issued As Mandate: Jan. 12, 1971.